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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TECNIMED SRL, Plaintiff, v. KIDZ-MED, INC. AND AMERICAN SCIENTIFIC RESOURCES, INC., Defendants.	Civil Action No. 10CV7277 (PGG)

DECLARATIONS AND EXHIBITS IN SUPPORT OF PLAINTIFF'S MOTION
FOR ORDER TO SHOW CAUSE FOR PRELIMINARY INJUNCTION

TAB	DECLARATION
1.	Declaration of Eric Fishman in support of Plaintiff's Motion For Order to Show Cause and Preliminary Injunction, dated September 30, 2010.
2.	Declaration of Francesco Bellifemine in support of Plaintiff's Motion For Order to Show Cause and Preliminary Injunction, dated September 30, 2010, with Exhibits below attached thereto.

EXHIBIT	DESCRIPTION
1.	International Distribution Agreement and Addendum, dated March 31. 2008.
2.	Photograph of the Kidz-Med Thermofocus 5-in-1 Non-Contact Thermometer with NeverWake Technology packaging.
3.	Tecnimed's original advertisement for the Thermofocus 5-in-1 featuring artwork for its five uses.
4.	Promissory notes executed by ASR, dated October 30, 2007 and April 1, 2008, in favor of Tecnimed, due September 30, 2008.
5.	Settlement Agreement between ASR, Kidz-Med and Tecnimed, dated March 6, 2009.
6.	Intentionally Omitted
7.	Screenshot of the National Association of Chain Drug Stores ("NACDS") website announcing the 2010 Category Winners at the Marketplace June 2010 Convention, viewed September 27, 2010.
8.	Screenshot of the Kidz-Med 5-in-1 Non-Contact Thermometer on the NACDS website, viewed September 27, 2010.
9.	Photograph of the new Kidz-Med 5-in-1 Non-Contact Thermometer with NeverWake Technology packaging.
10.	Thermofocus 5-in-1 packaging zoomed in on the artwork featuring the thermometer's five uses.
11.	Kidz-Med's new thermometer packaging zoomed in on the artwork featuring the thermometer's five uses.
12.	Screenshot from Tecnimed's promotional DVD for the Thermofocus 5-in-1.

13.	Kidz-Med brochure at the NACDS for the Kidz-Med 5-in-1 Non-Contact Thermometer, featuring Thermofocus 5-in-1's original artwork.
14.	ASR press release, dated December 28, 2009.
15.	ASR Issuer Information and Disclosure Statement Pursuant to Rule 15c2-11, dated August 19, 2010.
16.	Intentionally Omitted
17.	Screenshots of the Babies-R-Us, Walgreens and Buy Buy Baby websites, all selling the Thermofocus 5-in-1, viewed on September 28, 2010.
18.	Screenshot of the ASR website announcing the New! Kidz-Med 5-in-1 Non Contact Thermometer, with Dr. Richard G. Lagueruela's testimonial, on September 12, 2010, and the same webpage with another testimonial from Dr. Richard G. Lagueruela on September 27, 2010.
19.	Email from ASR's Pamela O'Dell to Tecnimed, dated December 5, 2006, attaching testimonials for the Thermofocus 5-in-1, including one from Dr. Richard G. Lagueruela.
20.	Screenshot of the Kidz-Med website featuring the "Kidz-Med 5-in-1 Thermometer FAQ's", with information regarding the Thermofocus 5-in-1, viewed on August 24, 2010.
21.	Screenshot from the Kidz-Med website, featuring a banner promoting their new thermometer, viewed on September 27, 2010.
22.	Screenshot from Amazon.com, the website where the Kidz-Med purchase link for their new thermometer directs the customer, viewed on September 27, 2010.
23.	ASR press release, dated December 1, 2009.
24.	ASR press release, dated January 12, 2010.
25.	Screenshot of the ASR website featuring the ABC show, "The Doctors", where the Thermofocus 5-in-1 was showcased; screenshot of the "Related Sources" link on The Doctors' website; and screenshot of the Kidz-Med website where the related sources link directs the customer, viewed on September 28, 2010.
26.	Screenshot of the Kidz-Med website featuring the Thermofocus 5-in-1 banner, viewed on August 17, 2010.
27.	Screenshot of the Kidz-Med website featuring the Thermofocus 5-in-1product information, viewed on August 17, 2010.

28.	Screenshot of the Kidz-Med website featuring their new thermometer, viewed on September 29, 2010.
29.	Screenshot of the metatags for the Kidz-Med internet page selling the Kidz-Med new thermometer, viewed on September 27, 2010.
30.	Screenshot of the Google website when the term "Thermofocus" is searched, viewed on September 27, 2010.
31.	Screenshot of Amazon.com website selling the Kidz-Med 5-in-1 Non-Contact Thermometer, including customer reviews, viewed on September 17, 2010.
32.	Letter from Eric Fishman to Richard Yeskoo, dated August 18, 2010.
33.	Letter from Richard Yeskoo to Eric Fishman, dated August 19, 2010.
34.	Letter from Eric Fishman to Richard Yeskoo, dated September 10, 2010, attaching letter from Eric Fishman to AJ Wholesale, dated September 8, 2010.
35.	Letter from Richard Yeskoo to Eric Fishman, dated September 10, 2010.
36.	Screenshot of the ASR website announcing the Kidz-Med, with a link to the "New! Kidz-Med 5-in1 Non-Contact Thermometer," viewed on August 17, 2010.
37.	Report on the new Kidz-Med thermometer by Tecnimed, dated September 24, 2010.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TECNIMED SRL, Plaintiff, v. KIDZ-MED, INC. AND AMERICAN SCIENTIFIC RESOURCES, INC., Defendants.	Civil Action No. 10CV7277 (PGG) **DECLARATION OF ERIC FISHMAN IN SUPPORT OF ORDER TO SHOW CAUSE FOR PRELIMINARY INJUNCTION**

Eric Fishman, duly admitted to the practice of law before the Southern District of New York, hereby declares as follows:

1. I am a member of Pillsbury Winthrop Shaw Pittman LLP, counsel for Plaintiff, Tecnimed srl ("Tecnimed), in the above-captioned action. I submit this declaration in support of Tecnimed's Order to Show Cause For Preliminary Injunction.

2. No prior request has been made for the relief requested herein.

3. As summarized below and more fully set forth in the complaint filed in this action, the declaration of Francesco Bellifemine, President of Tecnimed, dated September 30,

2010, together with exhibits thereto, and the Memorandum of Law In Support of the Order to Show Cause for Preliminary Injunction, Tecnimed will suffer irreparable harm if a preliminary injunction is not issued.

4. Plaintiff is the manufacturer of the Thermofocus 5-in-1 Non-Contact Thermometer, models 0700 and 01500 (the "Product" or "Thermofocus 5-in-1"). Defendants are the former exclusive distributors of the Product.

5. Defendants are now selling a non-contact thermometer in direct competition with the Thermofocus 5-in-1, in violation of their express non-compete agreement.

6. Not only directly competing, Defendants are deliberately "blurring" the distinction between the Thermofocus 5-in-1 thermometer and their own, using marks and trade dress associated with the Thermofocus 5-in-1 in order to promote their new thermometer. Defendants are also directing traffic to their websites using "Thermofocus" and "01500" as "metadata" tags, and have falsely advertised their new thermometer using product endorsements given with respect to the Thermofocus 5-in-1. Additionally, Defendants have sold the Thermofocus 5-in-1 as if their own product, deleting from marketing materials any reference to "Thermofocus" and selling it under the trade name "Kidz-Med 5-in-1 Non-Contact Thermometer" -- the same name they are now using to sell their competing product.

7. Tecnimed has moved by order to show cause because it will suffer immediate and irreparable injury to its business, including lost customer relationships and lost goodwill arising from the affiliation of the Thermofocus 5-in-1 with Defendants' lower quality product, if Defendants are not preliminarily enjoined from (a) breaching their non-competition obligations and (b) using marks and trade dress of the Product. Tecnimed first saw a prototype of Defendants' new product at a June 2010 tradeshow, and, to the best of our knowledge,

Defendants first started to sell the thermometer through retail outlets such as Amazon.com on or about September 17, 2010.

8. The parties have conferred as to the briefing schedule for this motion, and jointly propose that Defendants' opposition papers shall be served and filed on or before October 13, 2010, and that Plaintiff's reply papers shall be filed on or before October 20, 2010.

9. The parties also respectfully request that, if the Court's schedule permits, a hearing be held with respect to this motion on October 25, 28 or 29, 2010. The parties believe that the issues raised herein can be adequately addressed by the submission of affidavits and exhibits, together with oral argument, and that live testimony is not needed from the parties' principals, who reside in Italy and Florida.

WHEREFORE, I respectfully request that the Court grant the within relief as well as such other and further relief that may be just and proper.

I declare under penalty of perjury that the foregoing is true and correct.

September 30, 2010
New York, New York

Eric Fishman, Esq.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TECNIMED SRL, Plaintiff, v. KIDZ-MED, INC. AND AMERICAN SCIENTIFIC RESOURCES, INC., Defendants.	Civil Action No. 10CV7277 (PGG) **DECLARATION OF FRANCESCO BELLIFEMINE, PRESIDENT, TECNIMED SRL**

I, FRANCESCO BELLIFEMINE, declare under penalty of perjury:

1. I am the President of Tecnimed srl ("Tecnimed"). The statements made herein are based on my personal knowledge, company records, or as otherwise indicated. This affidavit is submitted in support of Tecnimed's application for a preliminary injunction.

2. Tecnimed is an Italian corporation with its principal place of business in Vedano Olona, (VA) Italy.

3. Tecnimed is the manufacturer of, *inter alia*, the Thermofocus Non-Contact 5-in-1 Thermometer (model numbers 0700 and 01500) (the "Product" or "Thermofocus 5-in-1").

4. Tecnimed's Thermofocus 5-in-1 was the first non-contact clinical thermometer in the world. The Product was introduced to the marketplace in 2000 and is sold worldwide. When

pointed at the correct location and distance, the Thermofocus 5-in-1 uses two light beams safely to collect and evaluate infrared emissions from individuals and objects in order to measure their temperature without physical contact.

5. The Thermofocus 5-in-1 has long been marketed and sold by Tecnimed to parents as a safe and hygienic thermometer ideal for taking the temperature not only of a child, but also of food, formula or bath, as well as the ambient temperature in a nursery or room.

The Distribution Agreement and Notes

6. On August 27, 2007, Tecnimed and Kidz-Med entered into an International Distribution Contract, pursuant to which Tecnimed granted Kidz-Med the exclusive right to sell the Product in the United States through retail distribution channels.

7. On March 31, 2008, Tecnimed and Kidz-Med entered into a new International Distribution Contract which superseded the earlier contract. On the same day, Tecnimed and ASR also executed an Addendum to the International Distribution Agreement, which supplemented certain terms and conditions of the distribution agreement (the International Distribution Agreement and Addendum, as supplemented and amended from time to time, the "Distribution Agreement"). Attached as **Exhibit 1**, is a true and correct copy of the Distribution Agreement.

8. Pursuant to the Distribution Agreement, Defendants had to promote the Product "in accordance to the general directions given by Tecnimed" and had "to protect Tecnimed's interests with the diligence of a responsible businessman." *Id.* at § 5.1.

9. The Distribution Agreement required all advertising to be in accordance with instructions given by Tecnimed "in order to warrant that it conforms to Tecnimed's image and marketing policies." Tecnimed agreed to provide, and did provide, Defendants with "digital designs

and text illustrations to assist Distributor with respect to such advertising." All internet promotions of the Product had to be submitted "to the approval of Tecnimed." *Id.*

10. Tecnimed granted Defendants permission to market the thermometer in the United States under the trade name "Kidz-Med Thermofocus 5-in-1 Non-Contact Thermometer with NeverWake Technology."

11. Pursuant to the Distribution agreement, the parties agreed to use the packaging below to market the Product. Attached as **Exhibit 2**, is a true and correct copy of a photograph of the Thermofocus 5-in-1 packaging.

NEW!
ThermoFocus
"No-Touch" Thermometer
INTRODUCING
NeverWake Technology
No need to touch, startle, upset or wake your child.
1 SECOND
INFRARED READING
• Pediatrician recommended
• Clinically tested
• Safe, hygienic, and easy to use
• No expensive probe covers needed
5-in-1 Measure Any Temperature
Child
Food
Formula
Bath
Nursery
KIDZ MED

12. The Product packaging, first used in 2007 and still in use, uses the color blue and purple, and shows a mother holding an infant and using the thermometer on the infant.

13. The following trade names, marks, tag lines, logos and symbols were also used in the packaging and promotional materials for the Product:

- "NeverWake Technology"

- "No need to touch, startle, upset or wake your child"
- "5-in-1 Measures Any Temperature" followed by "Child, Food, Formula, Bath and Nursery"
- Artwork showing the five uses of the Product
- "Pediatrician recommended"
- "Safe, hygienic and easy to use"

See **Ex. 2**.

14. The "5-in-1" mark and the five pictures relating to the uses of the thermometer had been used by Tecnimed to promote the Thermofocus 5-in-1, long before Kidz-Med became the Product's distributor. Attached as **Exhibit 3**, is a true and correct copy of Tecnimed's original advertisement for the Thermofocus 5-in-1 featuring artwork for its five uses. The trade dress itself and the mark "NeverWake Technology" were devised by Defendants to promote the Product.

15. To protect Tecnimed against Kidz-Med using the foregoing marks for its own purposes, the Distribution Agreement requires Defendants, among other things: to "make use of Tecnimed's trademarks, trade names or any other symbols, for the only purpose of identifying and advertising the Products . . . in Tecnimed's sole interest" (**Ex. 1 at § 8.1**); "neither to register nor have registered, any domain, trademarks, trade names or symbols of Tecnimed or of the Products (nor any domain, trademarks, trade names or symbols that may be confused with Tecnimed's [marks])" and "not to include the above trademarks, trade names or symbols in his own trade or company name" (*Id.* at § 8.2); and after expiration of the Distribution Agreement, "not to make any reference to the previous relationship with Tecnimed, in order to avoid confusion on the side of the customers." (*Id.* at § 8.3);

16. To further protect Tecnimed, the Distribution Agreement also contains a non-competition provision:

> Distributor shall not distribute, manufacture or represent any products which are in competition with the Products, for the entire term of this contract and for two years after its effective termination. In particular, he shall not engage, within the Territory or elsewhere, directly or indirectly, acting as manufacturer, commission merchant, intermediary, reseller, distributor agent, or in any other way, for the benefit of himself or third parties who manufacture or market products that are in competition with the Products. *Id.* at § 3.1.

17. In 2007, pursuant to the Distribution Agreement, Tecnimed shipped approximately 56,800 units of the Product to Defendants. It is my understanding that Defendants still have in their possession (or in the possession of warehouses or retailers) approximately 17,000 units of unsold Product.

18. In connection with the purchase of the Product, ASR signed a promissory note in the principal amount of $350,000 dated October 30, 2007, in favor of Tecnimed, due April 30, 2008. Subsequently, ASR signed a second promissory note in the principal amount of $258,000, dated April 1, 2008, in favor of Tecnimed due September 30, 2008 (collectively, the "Notes"). Attached as **Exhibit 4**, is a true and correct copy of the Notes. Tecnimed holds a perfected security interest in the Product to secure this indebtedness.

19. The outstanding debt under the Notes is now $298,669.11, comprised of principal in the amount of $209,801.72, and accrued and unpaid interest in the amount of $88,867.39. These amounts are past due and ASR is in default under the Notes.

The Settlement Agreement

20. In the course of Defendants' distribution of the Thermofocus 5-in-1, various disputes arose between the parties relating to Kidz-Med's and ASR's failure to pay for the Products in full and their inability to meet the volume targets in the Distribution Agreement.

21. In 2008, the parties filed in this Court claims and counterclaims against each other arising out of the Distribution Agreement, which were eventually settled on March 6, 2009, pursuant to a settlement agreement (the "Settlement Agreement"). Attached as **Exhibit 5**, is a true and correct copy of the Settlement Agreement.

22. The Settlement Agreement terminated the Distribution Agreement "except as otherwise set forth in this Settlement Agreement." *Id.* at ¶ 2.

23. At the time of the settlement, Defendants' debt, excluding interest, was $620,560.82.

24. At the time of the settlement, Defendants still had tens of thousands of unsold units of the Product. Accordingly, the parties provided in the Settlement Agreement that "all obligations of ASR and Kidz-Med . . . for the Product shipped" continued and were not released. *Id.* at ¶ 12. Likewise, the parties agreed that all claims of Tecnimed "for the Product Tecnimed has shipped" shall "be dismissed without prejudice." *Id.* at ¶ 10.

25. The obligations of Defendants with respect to the Product shipped, as set forth above, expressly survived the Settlement Agreement.

26. In exchange for Defendants' continued obligations with respect to the Products shipped, the Settlement Agreement granted Defendants "continued exclusive rights to sell the Products in the United States to Walgreens, Babies R Us and any new retailers pre-approved by Tecnimed (the "Exclusivity Retailers")." *Id.* at ¶ 3(a).

27. ASR and Kidz-Med agreed in the Settlement Agreement that, until Tecnimed had been paid in full, they would "continue to exercise reasonable best efforts to market and sell the Product placed at the Exclusivity Retailers." *Id.* at ¶ 3(d).

28. Defendants also agreed in the Settlement Agreement to provide Tecnimed with monthly information about the Product sales and communications with the Exclusivity Retailers. *Id.* at ¶ 4.

29. To ensure that Defendants would continue to pay down their indebtedness to Tecnimed, the parties agreed that all existing or future Exclusivity Retailers would receive instructions to pay 50% of all sales proceeds directly to Tecnimed until such time as Defendants' indebtedness to Tecnimed was satisfied. *Id.* at ¶ 1.

30. Additionally, Defendants agreed "to pay Tecnimed 30% towards their indebtedness of any capital that they raise after the execution of this Agreement (whether through debt or equity investment or otherwise), up to the amount of the indebtedness due hereunder." *Id.* No such payments have been made. Indeed, I understand that Defendants have represented to my counsel that no capital was raised.

31. Defendants previously represented to Tecnimed that 90% of their revenues came from the sale of the Thermofocus 5-in-1.

32. To support Kidz-Med's ongoing sales efforts with respect to the Product, Tecnimed agreed to pay commissions to Defendants for sales made to the Exclusivity Retailers, and further agreed to forebear from accelerating or taking steps to enforce the Notes for a period of eighteen months. *Id.* at ¶ 3(c).

Defendants' Use Deceptive and Unfair Practices to Market a Competing Thermometer

33. In June 2010, I attended the National Association of Chain Drug Stores ("NACDS") Marketplace convention in San Diego, CA. The NACDS Marketplace is considered the premier annual retail event in the United States for retailers to meet with companies to identify new products for their upcoming season.

34. At the trade-show, Tecnimed's Thermofocus 5-in-1 was chosen as the winner in the "Healthcare/OTC" category. Attached as **Exhibit 7**, is a true and correct copy of a screenshot of the Marketplace winners on the NACDS website, with the relevant sections highlighted.

35. At the NACDS Marketplace, Kidz-Med introduced a prototype for a new non-contact thermometer called the "Kidz-Med 5-in-1 Non-Contact Thermometer with NeverWake Technology." This is the same trade name that Kidz-Med had used to promote the Tecnimed's Thermofocus 5-in-1, except without the word "Thermofocus."

36. The website for the NACDS Marketplace convention carried the following photograph of Kidz-Med's new thermometer:

KIDZ MED
Non-Contact Thermometer
INSTANT READING
KIDZ MED
MODE
°C/°F
MEM
SCAN
NeverWake
Technology
No need to touch, startle, upset or wake your child.
• Pediatrician recommended
• Proven accuracy
• Safe, hygienic, and easy to use
• No probe covers needed
5 in 1 Measure Any Temperature
Child
Nursery
Bath
Formula
Food

Attached as **Exhibit 8**, is a true and correct copy of a screenshot of Kidz-Med's new thermometer on the NACDS website.

37. Using the same blue and purple color scheme, with a mother holding a sleeping infant, the packaging and/or promotional materials for the new Kidz-Med thermometer use each of the following terms, phrases and symbols that Defendants had used in marketing the Thermofocus 5-in-1:

- "Never Wake Technology"
- "No need to touch, startle, upset or wake your child"
- "5-in-1 Measures Any Temperature" followed by "Child, Food, Formula, Bath and Nursery"
- Artwork showing the five uses of the Product
- "Pediatrician recommended"
- "Safe, hygienic and easy to use"

Attached as **Exhibit 9**, is a true and correct copy of a photograph of Kidz-Med's new thermometer packaging.

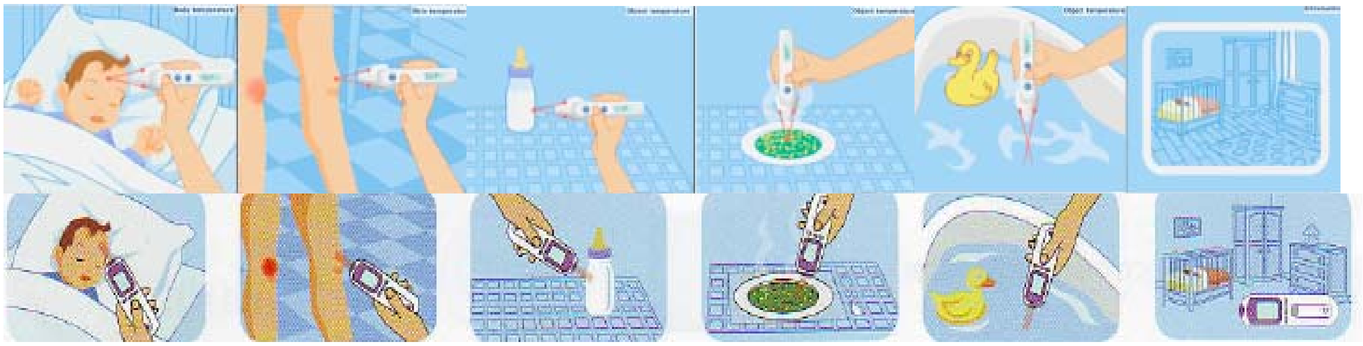
38. The packaging for Defendants' new thermometer prominently features the *exact same* artwork as the one on the Thermofocus 5-in-1 packaging to describe the five uses of the thermometer. The artwork on the left is from the Thermofocus 5-in-1 packaging and the one on the right is from Defendants' packaging for the new thermometer:

5-in-1
Measure Any Temperature
Child
Food
Formula
Bath
Nursery

5 in 1
Measure Any Temperature
Child
Nursery
Bath
Formula
Food

Attached as **Exhibit 10**, is a true and correct copy of the Thermofocus 5-in-1 packaging zoomed in on the artwork featuring its five uses; **Exhibit 11**, is a true and correct copy of Kidz-Med's new thermometer packaging zoomed in on the artwork featuring its five uses.

39. In their promotional materials, Kidz-Med also used artwork taken directly from Tecnimed. As shown below, the first line of illustrations is from the Tecnimed's promotional material for the Thermofocus 5-in-1 thermometer, and the second relates to Defendants' new thermometer:



Attached as **Exhibit 12**, is a true and correct copy of screenshots from Tecnimed's promotional DVD; **Exhibit 13**, is a true and correct copy of Defendants' brochure at the NACDS for Kidz-Med's new thermometer.

40. At the NACDS trade show, I requested that Kidz-Med provide me with a prototype of the thermometer so that Tecnimed could evaluate whether it was a competing thermometer or infringed any patents owned by Tecnimed. Kidz-Med representatives at the show agreed to provide Tecnimed with a prototype, but never sent it to Tecnimed. To the best of my knowledge, not until mid-September of this year, did Kidz-Med start to sell their thermometer through Amazon.com.

41. Press releases on ASR's website indicate that Defendants actually started to work with a Chinese manufacturer to introduce a competing line of thermometers as early as December 2009. A press release dated December 28, 2009, for example, says:

> American Scientific Resources, Inc. (the "Company" or "ASR") (Pink Sheets: ASFX) today announced the launch of a new line of affordable, revolutionary, 5-in-1 non-contact thermometers specifically designed to meet the needs of consumers and healthcare workers around the globe. . . . The new thermometers will be partially manufactured in China at the Company's overseas location . . . .

Attached as **Exhibit 14**, is a true and correct copy of the December 28, 2009 ASR press release, with relevant sections highlighted.

42. Defendants do not dispute that they are competing with Tecnimed. In recent disclosure materials, Defendants state that "Tecnimed's product, the Thermofocus, will be a direct competitor of the Kidz-Med Non Contact 5-in-1." **Ex. 15 at 23**. Attached as **Exhibit 15**, is a true and correct copy of the ASR disclosure statement, dated August 19, 2010, with relevant sections highlighted.

43. Rather, Defendants say that they were freed of their non-compete obligations because the Settlement Agreement terminated them.

44. The Thermofocus 5-in-1 is still being sold at Babies-R-Us.com and Walgreens.com, as well as Buybuybaby.com, Amazon.com and other internet retail outlets. Attached as **Exhibit 17**, is a true and correct copy of the websites for Babies-R-Us, Walgreens, and Buy Buy Baby, all selling the Thermofocus 5-in-1, viewed on September 28, 2010, with relevant sections highlighted.

45. According to ASR's August 2010 disclosure statement, "[s]ince [summer 2008], [Babies RUs] have been reordering [the Thermofocus 5-in-1] on a regular basis. Sales have averaged 50-100 units per week. The product is getting rave reviews on the BRU web site." **Ex. 15 at 11**. The disclosure also states that as of August 2010, "sales to Babies-R-Us and Buy Buy Baby account for over 60% of [Defendants'] revenue." *Id.* at 24.

46. Defendants have not shared any revenues with Tecnimed from sales at Buy Buy Baby.

47. Tecnimed's counsel has asked Defendants if they have been promoting their own thermometer to those stores, but Defendants have not responded.

48. In July, Tecnimed came to learn that, in order to further create the impression that Defendants' new product was affiliated with the Thermofocus Product, ASR, on its website, was using testimonials about Tecnimed's Product falsely to describe Kidz-Med's new thermometer.

49. For example, next to a picture of the new Kidz-Med product, Defendants posted the following testimonial from the Director of Surgical Services at Miami Children's Hospital:

> We've been using the 5-in-1 for the last several months in our children's hospital. It's extremely accurate and children of all ages aren't even aware their temperature is being taken, so there's no need to restrain an infant or child. Obtaining an accurate temperature is trauma free . . . . The 5-in-1 will revolutionize the health industry and make a difficult part of parenting a delight.

Ex. 18 at 1. Attached as **Exhibit 18**, is a true and correct copy of a screenshot from Kidz-Med's website, dated September 12, 2010, with Dr. Richard G. Lagueruela's testimonial, with relevant sections highlighted, and another testimonial dated September 27, 2010. Until recently, Defendants were using this testimonial for their new thermometer. ***Id.***

50. This testimonial, however, has nothing to do with Defendants' new thermometer, which was not even available for sale until mid-September; the testimonial was given with respect to Tecnimed's Product. Attached as **Exhibit 19**, is a true and correct copy of an email dated December 5, 2006 from ASR to Tecnimed attaching Dr. Richard G. Lagueruela's testimonial, among others, for the Thermofocus 5-in-1, with relevant sections highlighted.

51. Likewise, at the same time in July, I came to realize that Defendants were using the frequently asked questions ("FAQs") developed for the Tecnimed Product to describe the new Kidz-Med thermometer, relabeling the link to the FAQs the "Kidz-Med 5-in-1 FAQs." Attached as **Exhibit 20**, is a true and correct copy of the new thermometer's FAQ's used by Kidz-Med, dated August 24, 2010, with relevant sections highlighted.

52. The following photograph captures the top banner on the Kidz-Med website presently used to promote its new thermometer:

KIDZ MED
5 in 1 Non-Contact Thermometer
No need to touch, startle, upset or wake your child.
NOW Available!
with NeverWake Technology

Attached as **Exhibit 21**, is a true and correct copy of a screenshot from the Kidz-Med website with the banner promoting their new thermometer.

53. Material aspects of this banner were previously used by Kidz-Med to market the Thermofocus 5-in-1, including the trade name "5-in-1 Non-Contact Thermometer," the "NeverWake Technology" mark, the tag line "No need to startle, upset or wake your chilled," as well as the color of the banner and the use of a curved stripe. **Ex. 2**.

54. The purchase link on the Kidz-Med website brings one to a page that says, "Pediatrician recommended," the "5 in 1 measures any temperature: child, nursery, bath, formula, food" and that the product is "Safe, hygienic and easy to use" -- identical phrases used to promote the Product. Attached as **Exhibit 22**, is a true and correct copy of a screenshot of the Amazon.com website one is taken when the purchase link for the new thermometer is clicked, with relevant sections highlighted.

Defendants Pass-Off the Thermofocus 5-in-1 as if it is a Kidz-Med Product

55. Recently, we came to realize that starting in or about December 2009 and continuing through August 2010, Defendants promoted the Thermofocus 5-in-1 under the trade name "Kidz-Med 5-in-1 Non-Contact Thermometer," without using the word "Thermofocus." This turns out to be the very name they are now using to promote their new thermometer.

56. An ASR press release from December 1, 2009, discussed the "Kidz-Med 5-in-1 Non-Contact" thermometer reviewed by ABC News. The press release never mentions Tecnimed or the Thermofocus 5-in-1, even though that is the product being reviewed. Attached as **Exhibit 23**, is a true and correct copy of the December 1, 2009 ASR press release, with relevant sections highlighted.

57. In January 2010, Defendants secured placement of the Thermofocus 5-in-1 on the Good Morning America Show and the Rachel Ray Show where Defendants again promoted the Product as the "Kidz-Med 5-in-1 Non-Contact Thermometer." [1]

58. In a January 2010 ASR press release, ASR's Vice President said: "We are excited to see that the media A-list are featuring our non-contact, hygienic thermometer [the Thermofocus 5-in-1] as a must-have during the flu season. Our new non-contact thermometer will be launching this year, and we hope for similar attention to be drawn to it too." Attached as **Exhibit 24**, is a true and correct copy of the January 12, 2010 ASR press release, with relevant sections highlighted.

59. In March 2010, Defendants secured placement of the Thermofocus 5-in-1 on ABC's The Doctors where Defendants again promoted the Product as the "Kidz-Med 5-in-1 Non-Contact Thermometer."[2] **Ex. 25 at 4.** Attached as **Exhibit 25**, is a true and correct copy of the ASR website featuring The Doctors' episode where the Thermofocus 5-in-1 was promoted, with relevant sections highlighted.

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[1] Video clips from Good Morning America and the Rachel Ray show featuring the Thermofocus 5-in-1 can be viewed at http://www.youtube.com/watch?v=SfeZgOV5vTw starting at 4:52; http://www.youtube.com/watch?v=iTjt-GXFudE starting at 2:40. Another ASR press release dated January 12, 2010, released shortly before the shows, states that the Good Morning America segment would tell "Americans all about the benefits of the *Kidz-Med 5-in-1 contact thermometer* in a flu gadget segment." **Ex. 23**.

[2] A summary of The Doctor episode featuring the Thermofocus 5-in-1 is available through the ASR website at http://www.americansci.com/investors/2010/06/3-23-10-the-doctors/. **Ex. 25**. Once you click on the ASR sponsored link, you are taken to another ASR sponsored link with detailed information about the episode from The Doctor's website: http://www.americansci.com/investors/?v1JR4FTl. This link features a picture of the Thermofocus 5-in-1 with the following caption: "Thermometer for Kids. Kidz Med 5-in-1 thermometer uses infrared technology to measure a child's temperature in the temporal artery. Simply hold the thermometer an inch away from the forehead -- and presto! -- you receive an immediate reading, accurate within .4 degrees Fahrenheit of a rectal temperature, which is considered the ideal standard for children." *Id.* at 4. There is no mention of Tecnimed or the Thermofocus 5-in-1 brand. Most troubling is that when you click on the site's link to "Related Resources," which "provides you with more information about the products mentioned" on the show, it takes you to a page listing the Thermofocus as the "Kidz Med 5-in-1 Non-Contact Thermometer" and a link to the Kidz-Med website. *Id.* at 6. When you click on the link to the Kidz-Med website, instead of sending you to the Thermofocus 5-in-1 as featured on the episode, it takes you to the webpage featuring Kidz-Med's new thermometer, the "Kidz-Med 5-in-1 Non-contact Thermometer." These websites were last visited on September 28, 2010.

60. The following screen shot, from the first page of the Kidz-Med website on August 17, 2010, shows how defendants were selling Tecnimed's Thermofocus 5-in-1 under the trade name they are now using to sell their competing thermometer:

No need to touch, startle, upset or wake your child.
KIDZ MED
5-in-1 Non Contact Thermometer
5-in-1 Measure any temperature
1 SECOND INFRARED READING
Buy Now

Attached as **Exhibit 26**, is a true and correct copy of a screenshot of the Kidz-Med website on August 17, 2010, featuring the Thermofocus 5-in-1 banner.

61. Although one would not know it, the thermometer shown in the banner was the Tecnimed Thermofocus 5-in-1, not the Kidz-Med thermometer. The banner makes no mention of "Thermofocus" anywhere. *Id.* In fact, a link on the ASR website entitled "New! Kidz-Med 5-in-1 Non-Contact Thermometer," brought me to the Kidz-Med website where only the Thermofocus 5-in-1 was being sold. Attached as **Exhibit 36**, is a true and correct copy of the ASR website, visited on August 27, 2010; **Exhibit 27**, is a true and correct copy of the Kidz-Med website on August 17, 2010, featuring the Thermofocus 5-in-1 thermometer, with relevant sections highlighted.

62. On August 17, 2010, the KM website link: http://www.kidzmed.com/ccp0-prodshow/01500.html, would take you to a page with the title, "Kidz-Med 5-in-1 Non-contact Thermometer" picturing the Thermofocus 5-in-1 and providing the Product's benefits. **Ex. 27**. The same link: http://www.kidzmed.com/ccp0-prodshow/01500.html, now takes you to a page with the same title and nearly identical benefits information, except it pictures Defendant's new thermometer, not the Thermofocus. Attached as **Exhibit 28**, is a

true and correct copy of the Kidz-Med website featuring their new thermometer, with relevant sections highlighted.

63. Further investigation by Tecnimed's counsel led to the discovery that the "metatags" that Kidz-Med was using on its website page featuring their new thermometer for sale (http://www.kidzmed.com/ccp0-prodshow/01500.html), included the word "Thermofocus" and "01500", a specific model of the Thermofocus 5-in-1. **Ex. 29 at 1, 3 and 5**. Attached as **Exhibit 29**, is a true and correct copy of the metatags for Kidz-Med's internet page selling Kidz-Med's new thermometer on September 28, 2010, with the relevant tag highlighted. This means that the Kidz-Med website featuring their new thermometer is the second entry that comes up, after Tecnimed's Italian website, when someone does a search on Google for the term "Thermofocus". Attached as **Exhibit 30**, is a true and correct copy of the Google website when the term, "Thermofocus" was searched on September 27, 2010, with the relevant sections highlighted.

64. Although Defendants have only started to sell their new thermometer over the past few days, already, the confusion in the marketplace is evident. A review of the new thermometer, dated September 16, 2010, on Amazon.com, reads as follows:

> I bought the original 5 and 1 when we recently had a baby last year. When they came out with there [sic] new one, I had to try it. I just got it and WOW it's even better! . . . .

Attached as **Exhibit 31**, is a true and correct copy of a screenshot of the Amazon.com review for the new thermometer, with the relevant sections highlighted.

65. Tecnimed was finally able to obtain Kidz-Med's new thermometer when it went on sale in September. After examining it, we wrote a report noting the many respects in which it is inferior to the Thermofocus 5-in-1. The instruction manual has low resolution and illegible manufacturer data. The instrument appears to register surface temperature incorrectly. The unit has an unused push-button on the side, and the plastic packaging is dirty with traces of glue. Attached as **Exhibit 37**, is a true and correct copy of the report authored by Tecnimed of the new Kidz-Med thermometer, dated September 24, 2010.

Defendants Refuse to Stop Their Unfair and Deceptive Practices

66. On August 18, 2010, counsel for Tecnimed sent a cease and desist letter to counsel for Defendants, demanding that they stop selling the competing thermometer and stop passing-off the Product as if a Kidz-Med manufactured product without any reference to "Thermofocus." Tecnimed further demanded that, when Defendants again undertake to sell a competing product at the conclusion of the non-compete period, they do so without using Tecnimed's marks and symbols and without creating the false impression that the new thermometer is affiliated with the Thermofocus 5-in-1. Attached as **Exhibit 32**, is a true and correct copy of the August 18, 2010 letter from Eric Fishman.

67. In response, on August 19, 2010, Defendants' counsel responded refusing to honor Defendants' non-compete obligations. Attached as **Exhibit 33**, is a true and correct copy of the August 19, 2010 letter from Richard Yeskoo.

68. Defendants continue to market their new thermometer under the trade name "Kidz-Med 5-in-1 Non-Contact Thermometers" and to use other words, symbols and logos used to promote the Thermofocus 5-in-1. Until recently, Defendants used testimonials given about the Thermofocus 5-in-1 to falsely advertise their new thermometer.

69. Even though Defendants appear to have stopped selling the Thermofocus 5-in-1 on their website under the trade name "Kidz-Med 5-in-1 Non-Contact Thermometer," the Thermofocus is now listed on numerous other websites under that false trade name.

70. On September 10, 2010, counsel for Tecnimed transmitted another letter to counsel for Defendants, explaining in detail why Defendants' non-compete obligations remained in place and why Defendants' use of Tecnimed's symbols in marketing their new thermometers breached Defendants' contractual, statutory and common law obligations to Tecnimed. This letter reiterated the demand that Defendants cease and desist from selling a competing thermometer and from using symbols and other marks that self-evidently appear to link Defendants and their thermometer to Tecnimed and the Thermofocus 5-in-1. Attached as **Exhibit 34**, is a true and correct copy of the September 10, 2010 letter from Eric Fishman.

71. On September 10, 2010, in response, Defendants disputed that they have any ongoing non-compete obligations, and refused to stop marketing the competing product. Defendants have also refused to stop using the "Kidz-Med 5-in-1 Non-Contact Thermometer" trade name, the "Never Wake Technology" mark and all of the other words and symbols that were previously used by Kidz-Med to market the Thermofocus Product. Attached as **Exhibit 35**, is a true and correct copy of the September 10, 2010 letter from Richard Yeskoo.

72. To the best of my knowledge, Kidz-Med's new thermometer became available for sale on September 17, 2010.

73. Tecnimed is now entering what is known as the "cough and cold" season, when the majority of thermometers are sold, and it is thus essential that the non-competition clause be specifically enforced against Defendant through the upcoming season.

74. In sum, Defendants' marketing of their directly competing thermometer is likely to confuse customers and users, and divert sales away from the Thermofocus 5-in-1.

75. As Defendants' continuing sales and marketing of their new thermometer is irreparably harming Tecnimed's rights, it is imperative that Defendants' harmful actions be halted as quickly as possible. A hearing should therefore be scheduled as soon as reasonably possible to address Tecnimed's request for a preliminary injunction during the pendency of this action.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on September 30, 2010

By ______________________________
Francesco Bellifemine